

conducted in a fair, equitable, and nondiscriminatory manner. If the hearing proceeds before completion of a full investigation, Kay's rights will have been irreversibly violated. Nothing could be done after the fact to restore Kay's rights after they have been trampled.<sup>43</sup>

There are no private parties to this proceeding, so the Commission need not be concerned that a stay would prejudice them in any way. Moreover, a stay would be in the public interest. The public interest would first be served by the preservation of the integrity of the Commission's investigatory, enforcement, and hearing functions. In addition, the ultimate regulatory penalty sought in this proceeding (the revocation of all of Kay's licenses) will result not only in private financial injury to Kay, but also the deprivation of service to approximately 1,000 customers using approximately 10,000 units,<sup>44</sup> not to mention the loss of jobs by Kay's employees.<sup>45</sup> There is much to be preserved and gained and virtually nothing to lose by simply staying these proceedings until these serious and fully substantiated allegations can be investigated and resolved.

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<sup>43</sup> Even monetary compensation is not a sufficient remedy for deprivation of Constitutional rights. Moreover, while Kay will certainly pursue every judicial remedy at his disposal, he may be precluded from seeking compensation from the Commission for violation of his rights by the Federal Tort Claims Act. E.g., 28 U.S.C. § 2680.

<sup>44</sup> Kay is virtually the last remaining purveyor of full service traditional dispatch services in the Los Angeles area. If Kay's licenses are recovered and the spectrum recovered, it is estimated that fewer than 1,000 of the units currently served by Kay would be accommodated on other existing traditional systems. Customers representing about 9,000 units would be forced to migrate to wide area digital systems at a cost of approximately \$200 per unit and would realize a significant increase in monthly service fees. In addition, they would lose the benefit of custom designed systems provided by Kay (who has the flexibility to design systems to fit the customer's need), and would instead be required to modify their needs to correspond to the "one-size-fits-all" system provided by the digital provider.

<sup>45</sup> Kay currently employs fifteen employees, four of whom are minorities and five of whom are women. While most of these will have difficulty finding jobs in the current economic climate in Los Angeles, three of them are elderly (nearing or over 60 years old) and will likely find reemployment virtually impossible.

## **2. Directives to the Presiding Officer**

Should the Commission neither set aside the *HDO* nor stay the proceedings, and without waiving or conceding his position on those requests, Kay alternatively requests that certain specific directives be made to the Presiding Judge regarding the conduct of the hearing. Specifically, the Commission should: (a) direct the Presiding Judge to delete, defer, or modify the added issues, (b) direct the Presiding Judge to afford Kay additional discovery to remedy the unlawful lack of notice and improper and discriminatory discovery by the Bureau, and (c) declare that Kay's allegations regarding irregularities, improprieties, and illegalities during the pre-designation investigation of Kay are relevant areas of inquiry as to which Kay may conduct discovery and on which he may rely in presenting his defense.

### **(a) Deletion, Deferral, or Modification of the Added Issues**

On November 28, 1997, the *Initial Decision of Administrative Law Judge John M. Frysiak* ("*Sobel ID*"), FCC 97D-13, was released in WT Docket No. 97-56. The Presiding Judge in that case recommended to the Commission the conclusions (a) that a management agreement between Kay and Sobel constituted an unauthorized transfer of control of some of Sobel's stations to Kay, and (b) that Sobel lacked candor when he did not expressly disclose the agreement in a January 1995 affidavit submitted in WT Docket No. 94-147. Kay, who is an intervenor in WT Docket No. 97-56, disputes these conclusions, and both Kay and Sobel have submitted exceptions that are still pending before the Commission.

After issuance of the *Sobel ID*, the Presiding Judge added the following issues:

To determine, based on the findings and conclusions of [the *Sobel ID*] concerning [Kay's] participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether [Kay] misrepresented facts or lacked candor in presenting a Motion to Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

*Memorandum Opinion and Order*, FCC 98M-15, released February 2, 1998.

(i) *Deletion of the Issues*

Kay respectfully submits that the addition of these issues is a direct violation of Section 1.229(a) of the Commission's Rules, which requires that motions to enlarge issues be presented within 15 days of the publication of the designation order in the Federal Register. 47 U.S.C. § 1.229(a). Section 1.229(b)(3) states: "Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party." 47 C.F.R. § 1.229(b)(3). The added issues were based on information the Bureau had in its possession since early 1995,<sup>46</sup> and yet the Bureau did not seek to add the issues in the earlier stages of this proceeding. The addition of the issue more than three years after designation was inappropriate and prejudicial to Kay, and the added issues therefore should be deleted.

(ii) *Deferral of the Added Issues*

It is inherently unfair to require Kay to relitigate these matters, which involve the same events that were the subject of the *Sobel ID*, before the *Sobel ID* is effective and while the appeal from the *Sobel ID* is still pending before the Commission. Indeed, it decimates a party's right to Commission review of an initial decision for it to be forced to defend against virtually identical issues in another proceeding before the ink on the exceptions is even dry. This is also an inefficient use of Commission resources. Thus, if the Commission does not delete the added

issues, it should, at a minimum, defer any hearing on the issues pending conclusion of the appeal of the *Sobel ID*. There would be no prejudice to the Bureau insofar as any resolution in this proceeding could be conditioned on further proceedings that may be appropriate in light of the ultimate decision in the *Sobel* case.

Deferral of the added issues is consistent with, if not required by, prior Commission precedent. In many cases the Commission has conditionally granted applications without prejudice to reexamination following resolution of a separate proceeding in which the basic qualifications of the applicant or an affiliate was in issue. *E.g., RKO General, Inc.*, 44 FCC 2d 123 at ¶ 39(d) (1973). Even when it later invoked the condition and designated several renewal applications for hearing, the Commission "direct[ed] that the hearing not commence until all court appeals of the Boston, New York, and Los Angeles cases have been completed [in order to] conserve administrative resources by permitting the parties to take into account any judicial decision in those cases." *RKO General, Inc.*, 82 FCC 2d 291 at ¶ 7 (1980). This same approach has been followed in other wireless services. *E.g. Broadcast Data Corp.*, 2 FCC Rcd 1654 at ¶ 4(a) (Com. Car. Bur. 1987); *Digital Paging Systems, Inc.*, 1 FCC Rcd 1031 at ¶ 6(a) (Com. Car. Bur. 1986). Accordingly, the Commission should direct that no hearing be conducted on the added issues until completion of appeal of the *Sobel ID*, including any judicial appeals.

(iii) *Modification of the Added Issues*

If the Commission neither deletes nor defers the added issues, Kay asks that the issues be modified insofar as the Presiding Judge invoked the doctrine of collateral estoppel against Kay on the transfer of control issue. The Presiding Judge ordered: "The issues of control in the [*Sobel ID*] should not be relitigated in this case and Kay should be permitted to offer evidence and

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<sup>46</sup> The transfer of control issue is based on a management agreement, a copy of which was produced to the Bureau in March of 1995. The misrepresentation issue is based on a pleading filed by Kay in January of 1995.

argument only on the ultimate issue [of the] impact on his qualifications." *Memorandum Opinion and Order*, FCC 98M-15 at ¶ 5. Kay respectfully submits that this ruling was in error and should be corrected if there are to be proceedings on the added issues.

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits. . . ." *See Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, the prior adjudication of an issue is not binding in a subsequent proceeding unless (1) an issue identical to one that was previously litigated and that was essential to the previous decision; (2) the prior adjudication must have reached the stage of being a final judgment on the merits; (3) the party to be estopped must have been a party to the prior litigation. or in privity with such a party; (4) the estopped party must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Yates v. United States*, 354 U.S. 298 (1957); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Collateral estoppel is applicable to a decision by an administrative agency acting in its judicial capacity. *Nasem v. Brown*, 595 F. 2d 801, 805, (D.C. Cir. 1979), and FCC licensing proceedings are administrative adjudications subject to collateral estoppel, e.g., *Gordon County Broadcasting Co. v. FCC*, 446 F. 2d 1335, 1338 (D.C. Cir. 1971); *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F. 2d 811, 813 (D.C. Cir. 1962).

Collateral estoppel is not, however, properly applied to an administrative law judge's initial decision until finally reviewed by the Commission. "[I]t is inappropriate to give findings of an Initial Decision collateral estoppel effect where those findings have not actually been litigated to a final decision in which they were necessary to the outcome." *Georgia Public Telecommunications Commission*, 7 FCC Rcd 7996, 7999 n.29 (1992); see also, *Normandy Broadcasting Corp.*, 11 FCC Rcd 3559 (1996). Even a final initial decision unreviewed by the Commission is not binding precedent, *WFPG, Inc.*, 24 RR 419, 425-426 (1962), surely a non-

final initial decision that is not yet effective<sup>47</sup> and as to which review is pending should not be subject to collateral estoppel.<sup>48</sup> The application of collateral estoppel is clearly inappropriate and Kay should not be precluded the opportunity to offer evidence on and argue the transfer of control issue if it is not deleted or deferred.

(b) Additional Discovery

Kay has demonstrated egregious violations of his due process rights in this proceeding--in particular the notice provisions of the Communications Act and the Administrative Procedure Act. The Bureau was permitted to proceed on issues for which there was no prima facie factual evidence, it was given free reign to use discovery as a fishing expedition to dig up whatever it might be able to find, and all the while Kay's repeated requests for a statement of the factual issues against him--a statement required by statute and the Constitution--were consistently denied. The Bureau did not finally produce a notice of the factual matters to be asserted against Kay until more than two weeks after the close of discovery and less than three weeks before Kay is scheduled to submit his direct case exhibits. It may well be too late to remedy these serious due process violations, but an effort to mitigate them should be made. In this regard, the Commission should direct the Presiding Judge to afford Kay additional discovery. The scope of such discovery should obviously include the matters set forth in the recent *WTB Statement*, but Kay should also be given latitude to engage in discovery from Bureau staff.

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<sup>47</sup> Section 1.302(b) of the Rules provides, in part: "If an appeal is filed, or if the Commission reviews the ruling on its own motion, the effect of the ruling is further stayed pending the completion of proceedings on appeal or review." 47 C.F.R. § 1.302(b).

<sup>48</sup> The cases relied on by the Presiding Judge are inapposite. *Stereo Broadcasters, Inc.*, 74 FCC 2d 543, 545 (1979, *aff'd*, 652 F.2d 1026, 1030 (D.C. Cir. 1981) is not instructive on the doctrine of collateral estoppel; rather, it merely holds that once a initial decision has been issued as to a licensee's qualifications, that licensee is no longer eligible for relief under the Commission's distress sale policy. Similarly, in *Ocean Pines FM Partnership*, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989), the Presiding Judge had not invoked collateral estoppel but had merely added issues based on an initial decision in another case. He did not preclude or restrict the applicant's ability to litigate or argue the issues.

This is a unique case in that the conduct (or, in this case, misconduct) of the Bureau is directly intertwined with the conduct of the licensee that is challenged. Thus, without conceding that his actions in 1994 constituted a violation of Section 308(b) of the Act, Kay will demonstrate at trial that his actions were fully justified in light of the actions of the Bureau, some of which are set forth in Section II of this pleading. For example, Kay was being asked to turn over his entire customer list at a time when he knew that (a) several of his competitors were acting in concert to attempt to get him into trouble with the Commission, and (b) the Bureau was improperly releasing information to Kay's competitors and engaging in *ex parte* communications to Kay's detriment. As explained in the following section, Kay should be permitted to offer this at hearing as a defense against the Section 308(b) issue, if not others as well, and he therefore should be given the opportunity to conduct discovery thereupon.

(c) Admissibility and Relevance of Bureau Conduct

The Bureau demurred to the presentation of many of these same charges by Sobel in WT Docket No. 97-56, on the grounds that Sobel's allegations of Bureau misconduct in the Kay proceeding should be presented in the Kay proceeding. *Bureau's Sobel Opposition* at ¶¶ 8-9, 25. Yet, the Bureau has consistently opposed, on relevancy grounds, every attempt by Kay to conduct discovery into such matters. It is therefore meretricious for the Bureau to object to the presentation of the issues here on the grounds that they should be raised in the Kay proceeding. The Presiding Judge has thus far sustained the Bureau's objections. If this case is remanded for hearing, the Commission should expressly direct that these matters will be deemed relevant and that Kay will be permitted to inquire into them both in pursuing additional discovery (including discovery against the Bureau) and in presenting any direct or rebuttal case at the hearing itself.

#### IV. CONCLUSION

WHEREFORE, it is respectfully requested that the relief requested in Section IV, above, be granted.

Respectfully submitted this 12th day of May, 1998

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**N.B. THE ATTACHMENTS REFERENCED HEREIN ARE IN A  
SEPARATE BOOK TO BE FILED ON MONDAY 6/15/98.**



**CERTIFICATE OF SERVICE**

I, Robert J. Keller, counsel for James A. Kay, Jr., hereby certify that on this 12<sup>th</sup> day of June, 1998, I caused copies of the foregoing **PETITION FOR EXTRAORDINARY RELIEF** to be hand served (except as indicated) on the officials and parties in WT Docket No. 94-147, as follows:

HON RICHARD L SIPPEL  
ADMINISTRATIVE LAW JUDGE  
FEDERAL COMMUNICATIONS COMMISSION  
2000 L ST NW STE 218  
WASHINGTON DC 20554-0003

JOHN SCHAUBLE ESQ  
ENFORCEMENT DIVISION  
WIRELESS TELECOMMUNICATIONS BUREAU  
FEDERAL COMMUNICATIONS COMMISSION  
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GETTYSBURG OFFICE OF OPERATIONS  
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A handwritten signature in black ink, reading "Robert J. Keller", written over a horizontal line.

Robert J. Keller